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**DEPARTMENT OF STATE**

**48 CFR Parts 609 and 649**

**[Public Notice: 9479]**

**RIN: 1400-AD90**

**Department of State Acquisition Regulation**

**AGENCY:** Department of State.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of State (DOS) proposes to amend the Department of State Acquisition Regulation (DOSAR) to provide procedural changes relating to the suspension and debarment process.

**DATES:** The Department of State will accept comments on this proposed rule until *[insert date 60 days after date of publication in the Federal Register]*.

**ADDRESSES:** You may submit comments by any of the following methods:

- E-mail: [KosarCM@state.gov](mailto:KosarCM@state.gov). You must include the RIN in the subject line of your message.
- Mail (paper, disk, or CD-ROM submissions): Ms. Colleen Kosar, Policy Division, Office of the Procurement Executive, A/OPE, 2201 C Street, NW, Suite 1060, State Annex Number 15, Washington, DC 20520.
- Persons with access to the internet may view this proposed rule and submit comments by visiting the [regulations.gov](http://www.regulations.gov) web site at: <http://www.regulations.gov/search/Regs/home.html#home>, and searching for docket number DOS-2016-0012.

**FOR FURTHER INFORMATION CONTACT:** Ms. Colleen Kosar, Policy Division, Office of the Procurement Executive, A/OPE, 2201 C Street, NW, Suite 1060, State Annex Number 15, Washington, DC 20520. Telephone 703-516-1685.

**SUPPLEMENTARY INFORMATION:** The purpose of this proposed rule is to update 48 CFR part 609, subpart 609.4, Debarment, Suspension, and Ineligibility and part 649, Termination of Contracts. Primarily, this update simplifies the procedural aspects of the suspension and debarment process, by simplifying the fact-finding process, wherein a single fact-finding official may be used in lieu of a fact-finding panel. Specifically, the proposed rule would:

- Amend section 609.403-70 to remove the definition of “Notice,” and revise the definition of “fact-finding official.”
- Make an editorial change to section 609.405-1.
- Redesignate section 609.405-70 as section 649.101-70.
- Amend section 609.406-3(a)(1) to remove references to mandated actions by the Office of the Inspector General (OIG). The OIG is autonomous by statute and not subject to direction from the DOSAR.
- Make editorial changes to paragraphs 609.406-3(a)(2), (b)(2) and (c)(2).
- Add paragraph 609.406-3(a)(3) to make it clear that the referral file may be supplemented prior to determining whether or not to propose debarment.
- Revise paragraphs 609.406-3(b)(3)-(7) to simplify the fact-finding process, wherein a single fact-finding official may be used in lieu of a fact-finding panel and to eliminate specific entitlements and deadlines not required by the FAR.

- Amend section 609.406-3(d) and 609.407-3(d) to remove “and to the General Services Administration in accordance with 609.404.”
- Amend section 609.407-3(b)(2) to change “panel” to “official.”

## **Regulatory Findings**

### *Administrative Procedure Act.*

In accordance with the provisions of the Administrative Procedure Act governing rules promulgated by federal agencies that affect the public (5 U.S.C. 552 and 553), the Department is publishing this proposed rule and inviting public comment.

### *Regulatory Flexibility Act.*

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This determination was based on the fact that the changes proposed in this update have no impact on small businesses. The number of small businesses considered for suspension or debarment will not grow or shrink as a result of the proposed changes. The Department analyzed the suspension/debarment actions that occurred in FY14 and no small businesses were impacted.

### *Unfunded Mandates Act of 1995.*

This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Act of 1995.

*Small Business Regulatory Enforcement Fairness Act of 1996.*

This proposed rule is not a major rule as defined by the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 801 et seq.). This proposed rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and import markets. This determination was based on the fact that the proposed changes are intended to simplify the procedural aspects of the suspension and debarment process. The proposed rule does not place new requirements on contract performance. The proposed rule does not have a significant cost or administrative impact on offerors or contractors.

*Executive Orders 12866 and 13563.*

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). E.O. 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department of State does not consider this proposed rule to be an “economically significant regulatory action” under Executive Order 12866.

In addition, the Department is exempt from Executive Order 12866 except to the extent that it is promulgating regulations in conjunction with a domestic agency that are significant regulatory actions. The Department has nevertheless reviewed the regulation

to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders and finds that the benefits of updating this rule outweigh any costs, which the Department assesses to be minimal.

Executive Order 13132.

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Executive Order 13175.

The Department has determined that this proposed rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this proposed rulemaking.

Paperwork Reduction Act.

The proposed rule imposes no new or revised information collections under the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35).

**List of Subjects in 48 CFR Parts 609 and 649**

Administrative practice and procedure, Government procurement.

For the reasons stated in the preamble, the Department of State proposes to amend 48 CFR chapter 6 as follows:

1. The authority citation for 48 CFR Parts 609 and 649 continues to read as follows:

Authority: 22 U.S.C. 2651a, 40 U.S.C. 121(c) and 48 CFR chapter 1.

## **PART 609—CONTRACTOR QUALIFICATIONS**

2. Revise section 609.403-70 to read as follows:

### **609.403-70 DOSAR definitions.**

*Fact-finding official* means the individual designated by the debarring official to conduct additional proceedings as necessary concerning disputed material facts.

### **609.405-1 [Amended]**

3. In section 609.405-1, remove “609.405-70” and add in its place “649.101-70”.

### **609.405-70 [Redesignated as 649.101-70 and Amended]**

4. Redesignate section 609.405-70 as 649.101-70 and revise the heading of redesignated section 649.101-70 to read as follows:

### **649.101-70 Termination action decisions after debarment.**

\* \* \* \* \*

### **609.406-3 [Revised]**

5. In section 609.406-3, revise paragraphs (a), (b)(2)-(b)(7), (c)(2) and (d), to read as follows:

### **609.406-3 Procedures.**

(a) Investigation and referral. (1) DOS employees aware of any cause that might serve as the basis for debarment shall refer those cases through the contracting officer to the debarring official. The debarring official shall refer to the Office of the Inspector General all reported cases that involve possible criminal or fraudulent activities for investigation by that office.

(2) Referrals for consideration of debarment shall include, as appropriate and available--

- (i) The cause for debarment (see FAR 9.406-2);
- (ii) A statement of facts;
- (iii) Copies of supporting documentary evidence and a list of all necessary or probable witnesses, including addresses and telephone numbers, together with a statement concerning their availability to appear at a fact-finding proceeding and the subject matter of their testimony;
- (iv) A list of all contractors involved, either as principals or as affiliates, including current or last known home and business addresses and ZIP codes;
- (v) A statement of the acquisition history with such contractors;
- (vi) A statement concerning any known pertinent active or potential criminal investigation, criminal or civil court proceedings, or administrative claim before Boards of Contract Appeals; and
- (vii) A statement from each DOS organizational element affected by the debarment action as to the impact of a debarment on DOS programs.

(3) As deemed appropriate, the debarring official may conduct investigations to supplement the information provided in the referral, or may request investigations by the Office of the Inspector General or other Department office.

(b) \* \* \*.

(2) In response to the debarment notice, if the contractor or its representative notifies the debarring official within 30 days after receipt of the notice that it wants to present information and arguments in person to the debarring official, that official, or a

designee, shall chair such a meeting. The oral presentation shall be conducted informally and a transcript need not be made. However, the contractor may supplement its oral presentation with written information and arguments for inclusion in the administrative record.

(3) Pursuant to FAR 9.406-3(b)(2), the contractor may request a fact-finding proceeding.

(4) The debarring official shall designate a fact-finding official and shall provide the fact-finding official with a copy of all documentary evidence considered in proposing debarment. Upon receipt of such material, the fact-finding official shall notify the contractor and schedule a hearing date.

(5) In addition to the purposes provided in FAR 9.406-3(b)(2), the hearing is intended to provide the debarring official with findings of fact based on a preponderance of evidence submitted to the fact-finding official and to provide the debarring official with a determination as to whether a cause for debarment exists, based on the facts as found.

(6) The fact-finding proceeding shall be conducted in accordance with procedures determined by the fact-finding official. The rules shall be as informal as is practicable, consistent with FAR 9.406-3(b). The fact-finding official is responsible for making the transcribed record of the hearing, unless the contractor and the fact-finding official agree to waive the requirement for a transcript.

(7) The fact-finding official shall deliver written findings and the transcribed record, if made, to the debarring official. The findings shall resolve any facts in dispute



based on a preponderance of the evidence presented and recommend whether a cause for debarment exists.

(c) \* \* \*

(2) When a determination is made to initiate action, the debarring official shall provide to the contractor and any specifically named affiliates written notice in accordance with FAR 9.406-3(c).

\* \* \* \* \*

(d) Debarring official's decision. In addition to complying with FAR 9.406-3(d) and FAR 9.406-3(e), the debarring official shall provide single copies of the decision to each DOS organizational element affected by the decision.

#### **609.407-3 [Amended]**

6. In section 609.407-3:

- a. In paragraph (b)(2), remove the word “panel”, and add in its place “official”.
- b. In paragraph (d), remove “and to the General Services Administration in accordance with 609.404”.

#### **PART 649— TERMINATION OF CONTRACTS**

7. In Part 649, add section heading 649.101 to read as follows:

#### **649.101 Authorities and responsibilities.**

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Procurement Executive,  
Department of State.

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